



Governor's Advisory Council for Exceptional Citizens (GACEC) 516 West Loockerman St., Dover, DE 19904  
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## **MEMORANDUM**

**DATE:** April 25, 2013

**TO:** The Honorable Members of the Delaware General Assembly

**FROM:** Dafne Carnright, Vice Chairperson  
GACEC

**RE:** **House Bill No. 42 (Surrogates for Health Care Decisions)**

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill No. 42 which adds adult aunts and uncles to the list of relatives who may act as a surrogate to make health care decisions for an adult patient. A surrogate may be needed if the patient lacks capacity and there is no agent or guardian, no prior designated surrogate, the prior designated surrogate is unavailable, or the health-care directive does not address the specific issue. The legislation would add a Par. "g" to read "(a)n adult aunt or uncle to the current list.

Initially, the addition of "adult aunt or uncle" would seem to be advantageous since identification of "close" relatives to make health care decisions may sometimes be difficult. However, the Delaware Code currently has conflicting authorizations in this context which merit correction through more definitive legislation.

For example, a "competing" statute [16 Del.C. §5530] authorizes the following relatives of residential Division of Developmental Disabilities Services (DDDS) clients to consent to elective surgery in the following descending order of priority:

- a. spouse;
- b. an adult child;
- c. a parent;
- d. an adult brother or sister;
- e. an adult grandchild;

- f. an adult aunt or uncle;
- g. an adult niece or nephew;
- h. a grandparent.

Obviously, this order conflicts with the order in Title 16 Del.C. §2507 and the order created by House Bill No. 42. Consider the following:

1) The DDDS statute disallows any relative acting as a surrogate if there is a Protection from Abuse (PFA) or no-contact order issued against the relative [16 Del.C. §5530(e)]. There is no such bar in the “Surrogacy” statute.

2) The Surrogacy statute bars a spouse from serving as a surrogate if a petition of divorce has been filed [16 Del.C. §2507(b)(2)a. The DDDS statute has no such bar.

3) The DDDS statute and House Bill No. 42 conflict in the order of precedence between uncles/aunts and nieces/nephews.

4) The DDDS statute adds a grandparent to the list of authorized surrogates.

Moreover, other statutes also conflict with both Title 16 Del.C. §§2507 and 5530. Specifically, Title 16 Del.C. §§1121(34) and 1122 authorize the “next of kin” to make health care decisions for individuals lacking competency in long-term care facilities in the absence of a guardian or representative. There is no definition of “next of kin”. However, consistent with Title 1 Del.C. §302(9) and a Wikipedia article on “next of kin”, the sequence of relatives is apparently as follows:

- a. children;
- b. parents;
- c. grandchildren;
- d. siblings;
- e. grandparents;
- f. great-grandchildren;
- g. nieces/nephews;
- h. aunts/uncles.

Given the conflict among the overlapping statutes, the Council recommends that more comprehensive legislation be prepared to create a uniform standard. Otherwise, health care providers and families will be faced with conflicting laws. Such legislation could clearly identify a lengthy sequence of relatives (rather than a technical reference to “next of kin”), address both the effect of a divorce petition and PFA, and clarify whether “step-relatives” are covered. “Step-relatives” are typically not included as “kin”. Cf. Title 12 Del.C. §101(1)(4).

Thank you in advance for your time and consideration of our position. Please feel free to contact me or Wendy Strauss should you have questions or concerns.